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she will not be allowed, at some other time, to revive the covenants of the deed: *Albee v. Wyman* (1857), 76 Mass. 222.

Parties to the Deed.

[The wife must sign the deed; she cannot act by attorney, even in an agreement filed of record in a suit for alimony and intended to amicably terminate such suit: *Wallingsford v. Wallingsford*

(1825), 6 H. & J. (Md.) 485. Here the agreement was at the foot of the husband's answer.

[In Vermont, the wife's father was permitted to sign the deed of separation, as the wife's agent. The separation had already occurred, and the father was treated as her trustee, and the deed held to be valid, as though she had signed it in fact: *Squires v. Squires* (1880), 53 Vt. 208. JAS. M. KERR.

Supreme Court of Wisconsin.

SOQUET v. THE STATE.

The testimony of a medical witness is, at best, hearsay, and inadmissible in a criminal trial for murder by poison, when the witness has had no practical experience in the treatment of cases of this character, and can testify only from memory, what medical works and instructors teach on the subject.

Boyle v. The State (1883), 57 Wis. 472, approved and followed. as supported equally by reason and authority.

Error to the Circuit Court of Brown County.

John P. Soquet was indicted for and convicted of murder in the first degree, and brings error.

Hudd & Wigman, for plaintiff in error.

C. E. Vroman and Assistant Attorney-General *L. K. Luse*, for the State.

ORTON, J. (November 8, 1888). The information charged the plaintiff in error with having murdered his wife, Esperance Soquet, on the 13th day of June, 1873, by poisoning, and the trial was had in April, 1888. The evidence tended to prove the following facts: The plaintiff in error and one August Mainsort, in June, 1873, lived as neighbors on farms one mile apart. The family of the plaintiff in error consisted of himself and his wife, Esperance, and seven children, and that of Mainsort consisted only of himself and wife; and a criminal intimacy appeared to exist between the plaintiff in error and the wife of Mainsort. Mainsort suddenly died, and, on autopsy, eight grains of arsenic were found in his stomach, and

the plaintiff in error was present, with his wife, at his death, and superintended and took great interest in his speedy interment. In about ten days afterwards, Esperance, the wife of the plaintiff in error, died, and a short time after that event the plaintiff in error married the widow of Mainsort. Esperance Soquet was a strong and healthy woman, and had borne eight children without unusual trouble. She was confined and brought forth a child on Monday morning under normal conditions, and passed through it safely. Dr. Munro, of Green Bay, was her attending physician, and he testified substantially that there was no indication of disease resulting from her confinement; but, that on Tuesday or Wednesday following, a great change had taken place in her condition, and she was very sick, and many things present, together with her symptoms, excited his suspicion that she had been poisoned with arsenic, and he made a diagnosis of her case sufficient to satisfy himself that she was suffering from some corrosive poison; and he made examination of the cooking utensils and other things for traces of poison, but found nothing. He then declined to treat her any further. In a very few days thereafter she died, and no autopsy was ever made to ascertain the cause of her death. Very soon after her death, her body became black, and much discolored. The plaintiff in error had been seen to give her mush, and to carry out of the room what was left of it, and to carry away the contents of her stomach by vomiting. The evidence, aside from these conditions observed by Dr. Munro and others, and from certain statements or admissions of the plaintiff in error, was circumstantial, and none of such admissions amounted to direct confessions. Over fourteen years had passed since the occurrence, and the events of that time, and such statements, or many of them, depended upon the memory of witnesses. The trial resulted in a verdict of guilty of murder in the first degree, and the plaintiff in error was sentenced to imprisonment for life.

The exceptions taken in behalf of the defendant, at the trial, are very numerous. But inasmuch as there may be no occasion for the same exceptions on another trial, we shall consider only such as are the most important and material, and upon which we are compelled to reverse the judgment of conviction.

The witness, Dr. Munro, made about the only diagnosis of the fatal sickness of the deceased; and he stated to the jury the various symptoms that came under his observation, and other witnesses testified to other symptoms and appearances. This witness having detailed the symptoms he had himself observed, was asked by the District Attorney, "What are the symptoms of arsenical poisoning?" Objection was made by the counsel for the prisoner that the witness was not shown to be an expert. The Court sustained the objection, until the witness could be further examined as to his qualifications to testify as an expert. He was thereupon asked, "Are you a member of any medical society?" and the witness answered, "Yes." He was further asked, "Graduate of any medical college?" and he answered, "No." He was then asked, "What medical society are you a member of?" and he answered, "Brown County." He was asked, "How long have you been a member of that society?" and he answered, "Ten or twelve years." He was then asked, "How long has your practice as a physician covered?" and he answered, "Twenty-five or thirty years." He was then asked, "Has it covered cases of poisoning?" and he answered, "Not that I remember just now." He was then asked, "Have you made a study of that branch of practice as well as other branches, and in the same way?" and he answered, "Just in the same way, yes." He was then asked, "State whether a knowledge of poisons and their effects is a part of the knowledge of a physician practicing?" and he answered, "It certainly is." He was then asked, "You may state what are the symptoms of arsenical poisoning?" This question was again objected to by the counsel of the prisoner, as the witness had not shown himself qualified, and the objection was overruled, and the counsel of the prisoner excepted to such ruling. The witness thereupon answered, stating the symptoms and appearances he had observed in the sickness of the diseased, and testified to by others, as the symptoms of arsenical poisoning. He was then asked, "What a livid appearance of the face indicated?" This question was also objected to, and the objection overruled, and exception taken. The witness answered, "An unhealthy circulation of the blood, for one thing." He was then asked, "In

connection with the symptoms you have described, what would it indicate, if anything?" The question was also objected to, and the objection was overruled, and exception taken. The witness answered, "Well, it would just indicate that the whole circulative system was suffering from something unknown, and possibly what I was suspecting;" and, under the same objection, he testified that certain appearances he had described, indicated arsenical poisoning, or other poisoning. On cross-examination, the witness, when asked, "Have you had a case of arsenical poisoning to treat yourself, individually, as a physician?" answered, "No;" and when asked, "Have you ever seen a person die, when you knew that he died from the effects of irritant poisoning—present at his death?" answered, "No;" and when asked, "Then all you know about what the symptoms of arsenical or irritant poisoning may be, is from theory, from your knowledge as a student of medicine?" answered, "And from books;" and when further asked, "And from reading scientific works upon that question?" answered, "Yes;" and when asked further, "Not from any practical observation of your own?" answered, "No."

Dr. Olmstead, offered as another medical witness and expert by the District Attorney, testified that he was a physician, and had been a practicing physician a little over thirteen years, and had been in practice all of the time, and was still practicing, and was then asked by the District Attorney, "Are you a member of any association?" and he answered, "Yes; a medical association; the Homoeopathic State Society of Wisconsin." He was then asked, "Has your practice covered cases of poisoning at all?" and he answered, "I never had a case of it." He was then asked, "Has your course of study and investigation carried you into the examination of symptoms of poisoning, and the effects of poison?" He answered, "Yes." He then testified that he had heard most of the testimony of Dr. Munro. An hypothetical question, claimed by the District Attorney to contain and embrace all the symptoms testified to by Dr. Munro, and other witnesses, and concluded with the questions: "What would you say was the matter with the patient?" and "What would be your diagnosis of the case?" This was objected to by the counsel of the prisoner

and the objection was overruled and exception taken, and the witness answered, "I should suspect that an irritant poison had been administered." He was then asked, "What irritant poison?" and he answered, "Arsenic." He was then asked, "Well, from the symptoms, as I have stated them, as compared with cholera morbus, which would you say the patient was suffering from?" and he answered, "I should say she was suffering from arsenical poisoning." On cross-examination, the witness further testified that he had never seen a case of arsenical poisoning, and never treated one, or seen one in his practice, and that all he knows about it, in relation to the effects of an irritant poison, was what he got from books and authorities that he had read and consulted, and from what he was taught at the medical college, without any practical knowledge or experience aside from that.

The testimony of these two medical witnesses was very material, if not indispensable, in proving an important element of the *corpus delicti*—that the deceased came to her death by criminal means. Dr. Munro was her attending physician, and upon his diagnosis, from actual observation of her symptoms, depended all of the medical testimony in the case. The Court, in instructing the jury, called their attention to the testimony of Dr. Munro particularly. It is true that there were two other medical witnesses who, in their practice, had each seen at least one case of poisoning by arsenic, who testified in answer to an hypothetical question embracing the symptoms testified to by others, that such symptoms indicated arsenical poisoning, but we cannot say that the verdict would have been the same without the testimony of Doctors Munro and Olmstead, and that it was therefore immaterial. It seems to us that the jury must have relied very much on their testimony. It is both surprising and unfortunate that upon such a long, difficult, and expensive trial of a case of murder in the first degree, the result should have been hazarded upon such a question as that of the qualification of the medical witnesses to give an opinion, that the symptoms of the last sickness of the deceased indicated poison by arsenic, when their disqualification was so apparent in the light of a recent decision of this court. Neither Dr. Munro nor Dr. Olmstead had ever seen a case, or had any

experience whatever on the subject of arsenical poisoning, and all that either of them knew upon the subject was derived from medical or scientific books, and medical instruction. In receiving their testimony, the Court committed and repeated the very error by reason of which the judgment in the case of *Boyle v. State* (1883), 57 Wis. 472, was reversed.

In that case Dr. Cody was allowed to testify as to what medical books and authorities said upon the subject of "strangulation," and that he did not know by experience of it, and had no personal knowledge on the subject. That case was unusually well considered, and the logic of the opinion is perfectly conclusive, and numerous authorities are cited to sustain the decision. Many cases in this State and elsewhere are cited, to show that medical works and authorities could not be read in evidence, and Mr. Justice TAYLOR well said: "Certainly, if the book itself cannot be read in evidence to the jury, the witness cannot be permitted to give extracts from it as evidence, depending upon his memory for their correctness. The palpable error in permitting Dr. Cody is apparent from the fact that he testified on the stand that he had no personal knowledge on the subject he was testifying about. He says, 'I have not seen a case of strangulation, and do not know by experience.'" I have quoted the testimony of Doctors Munro and Olmstead, by questions and answers, fully and correctly, that the application of *Boyle v. State* might clearly appear. The testimony of such medical witnesses is at best merely hearsay—what medical books and teachers taught or told them, repeated from memory. The learned counsel of the State asks this Court to review and overrule that case as not supported by authority. But it is supported by authority, and equally by reason.

The decision was made deliberately, and we can see no reason for revising or changing it. It is to be deplored that it escaped the attention of the Court and the counsel of the State, in a case of such serious consequences. The result and consequence of such a palpable error must be the same as in the case of *Boyle v. State*. The judgment must be reversed. It is more important to the public and the State than the con-

viction of the prisoner, that he be convicted, if at all, on legal and competent evidence.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial. The warden of the State prison will surrender the plaintiff in error to the sheriff of Brown county, who will hold him in custody until he shall be discharged by due course of law.

The Court, in deciding the above case and in laying down the test of a medical expert therein laid down, depends for its support upon the case therein cited of *Boyle v. State* (1883), 57 Wis. 472, of its own State, which holds that a physician cannot be permitted to give extracts from medical books as evidence, depending upon his memory for their correctness. This latter case again depends upon the case of *Stilling v. Town of Thorp* (1882), 54 Wis. 528, and numerous other cases cited therein, wherein a well established rule of evidence is followed, and that is, that medical books cannot be introduced or read in evidence. From this rule the Court reasons, in *Boyle v. State*, that inasmuch as medical books themselves cannot be read or introduced in evidence, it would be improper and in violation of such rule to allow extracts from such books to be introduced by way of the physician and his memory. Thus far the reasoning seems sound and logical, but to take the next step and hold, as the Court in the case under consideration does, with such ease and such emphasis, that, inasmuch as medical books themselves cannot be received in evidence, nor can a physician give extracts from them as evidence, a physician, therefore, is incompetent to testify as an expert, by reason of the fact that his knowledge of the subject matter is derived from such medical and scientific books and from instruction alone, without any practical experience,

is much more difficult and certainly challenges very careful investigation.

In taking this step, it would seem that the Court has failed to note any difference between the case under consideration and those of *Boyle v. State* and *Stilling v. Town of Thorp*—in other words, has failed to find any reasons why physicians, who have derived their knowledge of a subject from books, study and instruction alone, should be admitted to testify, while the books themselves, from which such knowledge is derived, should not be admitted as evidence.

The following reasons would seem to distinguish these cases, and will be found to be supported by authority, to wit:

First. The reading of such books would occupy too much of the time of the court and necessarily encumber and prolong its proceedings.

Second. It would be unsafe to take one book as authority, and would necessitate the introduction of many.

Third. A jury is ignorant of the matters of which such books treat, and cannot, of course, decide on their title to credit: *State v. Ferrell* (1859), 12 Rich. (S. C. Law) 321.

Fourth. A physician, with his mind trained and educated in such matters, can compare and weigh authorities, and, after careful research and study of the same, can come to wiser and safer conclusions.

Definitions.

[The term *expert* is derived from the Latin word, *expertus*, meaning practiced, experienced, skilled, and is defined to include one who is instructed by experience: Bouvier's Law Dict.; Anderson's Law Dict.; *Hyde v. Woolfolk* (1855), 1 Iowa 159, 167; *Estate of Toombes* (1880), 54 Cal. 509, 512-3.

"An expert is defined to be a person that possesses peculiar skill and knowledge upon the subject matter that he is required to give an opinion upon:" *State v. Phair* (1875), 48 Vt. 366, 377.

The Court, in *Dole v. Johnson* (1870), 50 N. H. 453, however, in commenting, said: "This definition is, perhaps, too narrow, for we must concede that there may be, in many instances and individuals, a higher degree of knowledge, not derived from, nor perfected, or enhanced by, a great amount, or even any degree of practical experience."

["We have endeavored to express the opinion of this Court upon the first question, that the disease of foot-rot in sheep, is a subject upon which the opinion of an expert can be received. Upon the second question, that the qualifications necessary to entitle Mr. Waite to testify are these: he must either be a veterinary doctor, qualified by some reading and study, as such, and having some practical experience in healing diseases of domestic animals, even though not practically acquainted with the disease of foot-rot in sheep, or else he must be really a man of science, qualified by a previous habit and course of attention, observation and special study, in the direction of the subject matter of his testimony:" per FOSTER, J., Id. 459. Here the witness testified, that, as editor of a stock journal, he had read extensively on the subject of foot-rot; and he named the works on that subject, which he had read. He also testified that he had had no practical

experience in the treatment of sheep for any disease: Id. 452.

"An expert must have made the subject upon which he gives his opinion, a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject:" DOE, J., *Jones v. Tucker* (1860), 41 N. H. 546, 548.

Men of Science.

[In the leading case on the admissibility of matter of opinion, Lord MANSFIELD said: "*Mr. Smeaton* understands the construction of harbors, the cause of their destruction, and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskillfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the *Trinity House*. I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received:" *Folkes v. Chadd* (1782), 3 Doug. 157, 159.

Persons of Skill.

["On questions of science and trade, or others of the same kind, persons of skill may, no doubt, be permitted to give their opinions in evidence; because the jury, being wholly unacquainted with the particulars on which such opinions are founded, would be unable to draw any correct conclusion from hearing them stated; for instance, was a physician to state the particular medicine administered to a patient; from being unacquainted with the operation and effect of such medicine, the jury would be wholly incompetent to judge, whether such treatment would probably produce the death of the patient or not. * * * In these, and similar cases, it is from

the opinion of persons skilled in the particular science or trade, and dealing in the particular article, that satisfactory evidence may be obtained; but when the necessity of admitting such evidence ceases, the exceptions to the general rule also cease:" GREEN, J., *Rockester v. Chester* (1826), 3 N. H. 349, 365. Under the stress of these last words, real estate experts were not allowed to testify to the value of a small piece of ground.

Experienced Persons.

[In *Ardesco Oil Co. v. Gilson* (1869), 63 Pa. 146, 151, SHARSWOOD, J., said—"An expert, as the word imports, is one having had experience. No clearly defined rule is to be found in the books, as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked. There are some matters of which every man, with ordinary opportunities of observation, is able to form a reliable opinion: *Wilkinson v. Moseley* (1857), 30 Ala. 562; *Dewitt v. Bailey* (1858), 17 N. Y. 340. It is not necessary, as it is said in one case, to call a drover or butcher to prove the value of a cow: *Ohio R. R. Co. v. Irwin* (1862), 27 Ill. 178. Nor is it imperatively required that the business or profession of the witness should be that which would enable him to form an opinion: *Van Deusen v. Young* (1858), 29 Barb. 9; *Smith v. Hill* (1856), 22 Id. 656; *Price v. Powell* (1850), 3 Comstock (N. Y.) 322; *Fowler v. Middleton* (1863), 6 Allen (Mass.) 92. In *Phillips v. Gregg* (1840), 10 Watts (Pa.) 158, witnesses who were not lawyers by profession, were received to testify as to what constituted a lawful marriage in the settlements of the Mississippi valley half a century before. While, undoubtedly, it must appear that the witness had enjoyed some means of special knowledge or experience, no rule can be laid down,

in the nature of things, as to the extent of it. It must be for the jury to judge of the extent of it." In this case a steam-fitter, with no knowledge of stills beyond that acquired from working on them, was allowed to testify as to the sufficiency of the strength of the iron used.

[In the case of *Phillips v. Gregg*, just cited, ROGERS, J., said—(p. 169)—"Foreign unwritten laws, customs and usages, may be proved, and must ordinarily be proved by parol evidence. And the usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath. But although these are the usual modes of authentication, yet they may be relaxed, or changed, as necessity, either physical or moral, may require, where there is reason to believe they are unattainable, and where a rigid adherence to them may probably produce extreme inconvenience or manifest injustice. In short, the peculiar circumstances of the case must enter largely into the consideration of the question of the competency of the evidence."

["There is a class of cases, however, depending upon questions involving a degree of skill and judgment such as is necessarily confined to a few individuals, exercising a particular science, art or profession. Such cases form an exception to the rule laid down, and the jury must necessarily depend, in the determination of such questions, not upon the exercise of their own judgments upon the facts, but upon the opinions and conclusions of others. It is manifest that this class of cases should not be unnecessarily extended, and that the opinions of experienced persons, in matters of skill and judgment, should not be admitted, except where they are the only means by which the jury can come to a correct conclusion:" UPHAM, J., *Peterborough v. Jaffrey* (1833), 6 N. H. 462, 463. And, accordingly, the

evidence of real estate experts, as to the ordinary value of land, was excluded.

Of Particular Science or Skill.

[“It is often very difficult to determine in regard to what particular matters and points witnesses may give testimony, by way of opinion. It is doubtful whether all the cases can be harmonized, or brought within any general rule or principle. The most comprehensive and accurate rule upon the subject we believe to be as follows: That the opinion of witnesses possessing peculiar skill is admissible, whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it:” DAY, J., *Muldouney v. Ill. Cent. R. R. Co.* (1873), 36 Iowa 462, 473. And brakemen, conductors and baggage masters were held incompetent to give an opinion upon the danger of coupling cars.

[“The opinion of the witness, respecting the value of the sled, was not admissible in evidence: *Rochester v. Chester* (1826), 3 N. H. 349; *Peterborough v. Jaffrey* (1833), 6 Id. 462. He was not a manufacturer of sleds, if that might be supposed to indicate skill, nor was he otherwise possessed of any particular science, or skill, respecting their construction or use. The fact that he had used sleds more than people in general, and had bought and sold many, might serve to show that he had more knowledge respecting the best form and size, and respecting the price at which they could be purchased or sold, than many others; but this is not sufficient to give him the character of an expert:” PARKER, C. J., *Beard v. Kirk* (1840), 11 N. H. 397, 400.

Of Practical Skill or Scientific Knowledge and Experience.

[Where a locomotive had exploded and killed the engineer, it was insisted, by the railroad company, “that the testimony of certain witnesses, whose occupation was that of boiler makers, was improperly received, as by their own testimony, they were incompetent to testify as experts. They all showed that, for a long time, they had been engaged in making boilers, and some of them showed experience in testing boilers. They testified to their knowledge and experience, as to the matters enquired of. Their testimony was clearly competent. The amount of weight to which their testimony was entitled, was a question for the jury to determine. Courts cannot establish a standard by which to measure expert witnesses. If they show that they have practical skill, or scientific knowledge and experience, as to the matters under investigation, they are competent to testify:” REESE, J., *S. C. & P. R. R. Co. v. Finlayson* (1881), 16 Neb. 578, 587.

A Skillful or Experienced Person.

[On an issue of insanity, it was contended that the trial judge erred in refusing to permit a consulting physician, Dr. Russell, “to give his opinion, based upon what he learned from the nurse and wife of the defendant and of the attending physician, taken in connection with his personal examination. It is asserted that the information obtained from those sources became part of the personal examination of the witness, and, as such, formed a proper basis for a professional opinion which would be competent and legitimate evidence in the case; and, further, that the professional skill which would authorize the witness to testify to his opinions concerning the malady of a patient whom he has examined, authorizes him also to judge of the proper sources, in connec-

tion with his personal examination, from which to derive these opinions. * * * The proposition contains two fundamental errors. First, it makes the witness decide the question of the competency of evidence, thus putting him in the place of the Court. Next, while it excludes the declarations as incompetent testimony to go to the jury, it receives, as competent evidence, an opinion based upon that incompetent testimony, thus attempting to elevate the stream above the fountain, to make a corrupt tree bring forth good fruit. * * As a witness cannot be permitted to give his opinion as an expert, until it appears, by a preliminary examination, that he is a person of skill in the particular department, or subject matter in which his opinion is desired; so, too, it must appear that he has reliable information, or knowledge of the facts involved, and upon which his opinion is to be founded, before he can testify as an expert. * * * The very foundation for the theory of expert testimony is that of his superior knowledge in relation to the subject matter of which he is permitted to give an opinion, by which he, in a degree, assumes the functions of the jury." RICE, J., *Heald v. Thing* (1858), 45 Me. 392, 395.

["In the examination of experts, it is only necessary to keep constantly in view that their proper office is to instruct the Court and jury, in matters so far removed from the ordinary pursuits of life, that accurate knowledge of them can only be acquired by continued study and experience; the purpose is to enable both the Court and jury to judge intelligently of the force and application of the facts introduced in evidence, as they would have been able to do if they had been persons properly instructed upon the subjects involved." CLARK, J., *Coyte v. Comm.* (1883), 104 Pa. 117. This was said, as the introduction to a discussion of the form of questions, to

be put to an expert, for his opinion upon the facts in evidence upon a trial for murder.

Skillful or Scientific Men.

["As a general rule, the opinion of witnesses is not admissible in evidence. They must speak to facts within their knowledge. But upon questions of skill or science, with which a jury may not be supposed to be familiar, men who have made the subject matter of inquiry, the object of their particular attention or study, are competent to give their opinion. It must, however, be first shown that they are skillful or scientific men, or at least that they have superior actual skill or scientific knowledge in relation to the question, before their opinions can be competent. Mere opportunity for observation is not sufficient. * * * In the present case, Stephen Walker was permitted to give his opinion as to the quality of the soapstone in the quarry in controversy. This was peculiarly a question of scientific skill and knowledge, which the witness was not shown to possess. It only appeared that he had been more or less engaged for forty years in quarrying soapstone. * * But it did not appear that he had ever devoted any time or study to an investigation of the composition and characteristics of soapstone, or made any particular observations on that subject, so as to be better qualified to give an opinion on the scientific question propounded to him, than any member of the jury." FOWLER, J., *Page v. Parker* (1860), 40 N. H. 47, 59.

In *Central Railroad v. Mitchell* (1879), 63 Ga. 173, [a witness was allowed to testify "that he was a civil engineer, had surveyed railroads, including this particular road at the place of the accident. He gave considerable amount of evidence as to the depth, width, etc., of the cut," where an engineer was hurt by the derailment of his

locomotive through the washing down of the side of the cut. The witness also said—"The rules for construction of cuts, etc., which I have given, are found in books on engineering. I give these rules solely from what I recollect of the books. These rules are found in Mahan, Gillespie and Gilmore, and many others:" Id. p. 177. JACKSON, J., said—"The expert was competent to testify. Every expert derives much of his knowledge from books as well as from experience, and can give his opinion based upon the knowledge acquired from both sources:" Id. 180.

Summary.

From the above authorities and definitions it will be seen that the word "experience" is used many times, but in most cases is either so qualified, or used in the alternative, as to remove its necessity.

Necessity of Experience.

In the case of *Fairchild v. Bascomb* (1862), 35 Vt. 398, 410, the Court says, in passing, that a person who was merely by education a physician, if he had not practiced his profession, would not be deemed admissible as an expert, but does not base its decision on this point, as the case was opened up on other grounds. [However, in another branch of the case, the Court said: "Persons who are much accustomed to attend upon the sick, to watch the progress of diseases to their end, and to be with the dying, are, by their experience, enabled to form a better judgment as to the cause of disease and its probable effect upon the body and mind in the last hours of life, than others who have no such opportunity. Physicians who are in general practice, and nurses, thus become experts in such matters, so far as experience and observation can furnish knowledge. * * * In such cases, however there is so little uniformity in

the effects of diseases upon the mind just before death, that the mere opinion of a physician as to the matter, would obviously be evidence greatly inferior in value to the actual observation of an intelligent bystander:" ALDIS, J., Id. 408, 409. This decision does not seem to agree with those just cited, nor with the principal case: See *infra*, under *Profession or Occupation and Experience, both necessary*. The same court denied the attribute of expert to one merely experienced, in *Oakes v. Weston*, (1873), 45 Vt. 430, where the Court excluded one, who was asked his opinion upon the unreasonableness of a load, from experience in driving over the same road.

[In this connection it may be observed that one who had attended the deceased as his physician and was called "Doctor," and had attended to a drug store for some years, but was not a physician, was admitted by the same court to testify as an expert. The proof "addressed itself to the jury, and under a proper direction from the Court, should have induced the jury to accord little weight to the professional opinions of the witness:" COLLIER, C. J., *Washington v. Cole* (1844), 6 Ala. 212, 214.

Lawyer as an Expert in Another Profession.

[See, also, *supra*, under *Experienced Persons*.

[Where a lawyer, who had been in practice for sixteen years, was called as a medical expert upon the diseases of women, he was admitted upon his statement that he had, previously to his admission to the bar, attended a course of medical lectures, and had obtained a license from the State board of physicians, under which he had practiced medicine for one year. The witness also stated that he had continued to read medical works and felt competent

to express an opinion : *Tullis v. Kidd* (1847), 12 Ala. 648.

[“One who exercises an art or trade is supposed to be acquainted with it. Thus, a practicing physician would be presumed, from that circumstance alone, to be acquainted with the cause, and cure, of diseases; but it by no means follows that one who is not in the actual practice of medicine may not be skilled in the science, so as to be able to give correct opinions as to the existence, or cause, of disease. Clinical practice is doubtless a most efficient mode of acquiring such knowledge, by enabling the practitioner, from his own observation, to verify the assertions, or theories, of others, or to correct errors into which they may have fallen; and it may be that medical opinions not brought to this test, are not worthy of much reliance as the basis of a verdict of a jury. But, if one asserts an ability to give correct opinions upon any art, or science, from an acquaintance with the subject, acquired by observation and study, we cannot perceive on what ground he can be rejected, because he has not been in the actual practice of his profession. This circumstance, as already observed, may deprive his testimony of much weight with the jury, but it is no ground for excluding it. So also, among physicians in actual practice, superior skill, greater power, or opportunity for observation, may entitle the opinions of one, to much greater weight than those of another, although both are equally competent in legal estimation :” ORMOND, J., *Id.* 649-50.

[This case was affirmed in *Rash v. State* (1878), 61 Ala. 89, 95.

On the other hand, in *Missouri Pac. R'y Co. v. Finley* (1888), 38 Kan. 550, HORTON, C. J., said : “Upon the trial, C.W. Johnson who testified that he was a lawyer, by profession, and not a doctor or veterinary surgeon, was allowed to give his opinion as to the symptoms and

causes of Texas fever; and, also, was permitted to testify that the cattle communicating the Texas fever to domestic cattle in this State, came from that part of Texas south of latitude thirty-five. In order to determine whether the witness was competent as an expert, the following examination was had : Q. I will ask you if you have read a great deal upon the subject of Texas cattle? A. Yes, sir. Q. And your information is principally derived from the knowledge you have derived from reading in regard to it? A. From books; yes, sir. Q. Some little observation? A. Yes, sir; from the testimony of experts, taken in a case in which I have been interested as a lawyer. Q. Case in court? A. Yes, sir. Q. The principal portion, if not all, is from knowledge derived from books and the testimony of experts in court? A. Yes, sir. Upon this testimony, it does not appear to us that the witness possessed the legal qualifications of an expert. Where a person has been educated in a particular profession, as a physician, surgeon, or veterinarian, he is presumed to understand thoroughly the questions pertaining to his profession; but a person, not a member of those professions, who has read extensively from books and heard the testimony of experts in court, in regard to the diseases of men or cattle, is not considered an expert concerning the same :” *Id.* 560-1.

[So, in *Hass v. Marshall*, decided May 25, 1888, the Supreme Court of Pennsylvania held a practicing attorney incompetent to testify as to the chemical purity of certain whiskey. He had never been a practicing chemist, and could not make a quantitative or qualitative analysis, except as directed by a pamphlet on the subject of adulterated liquors; had studied medicine for three years; had been at the bar for forty years.

[The tendency of the latter decisions

would seem to be governed by the maxim: the law is a jealous mistress.

[The principle involved in the second of these cases was asserted by the Supreme Court of Michigan, in *Wickes Bros. v. Swift E. L. Co.*, decided May 18, 1888. A witness was not allowed to testify as an expert, when his qualifications were the result of conversation with mechanics and machinists about the cost of altering an engine.

Profession or Occupation, without Experience.

Any practicing physician is competent to express an opinion, as an expert, on a medical question: *Livingston's Case* (1857), 14 Grat. (Va.) 592; *State v. Clark* (1881), 15 Shand (S. C.) 403.

["Doctor Addy, as stated in the report" of the trial judge, "was an experienced physician, and was, in law, an expert as to all matters embraced within the range of his profession. Had he seen the dead body, therefore, when first found on the railroad track, there could be no doubt that his opinion, as to the length of time it had been dead, would be competent, on the ground that he was an expert, and this fact is within the range of his profession. But this principle, as appears from the authority already cited," 1 Greenleaf Ev. § 440, "does not confine the opinion of the expert, to facts coming under his own observation alone, but it permits him to found and express his opinion upon facts testified to by others. This was all that was done in this case, and the authority from Greenleaf seems to be directly in point. It fully warranted, in our judgment, the ruling of the circuit judge as to the competency of Doctor Addy's opinion." SIMPSON, C. J., *State v. Clark* (1881), 15 Shand (S. C.) 403, 408. The doctor examined the body after it had been removed to the railroad station.

[Where a druggist sold sulphate of

zinc by mistake for Epsom salts, "a supposed medical expert" was permitted "to testify to the effects of sulphate of zinc when taken into the system, from what he learned on the subject from books of recognized authority. The evidence was not incompetent. *Collier v. Simpson* (1831), 5 C. & P. 73; *Taylor v. The Railway* (1869), 48 N. H. 304. It was not very satisfactory expert evidence, but its weight was for the jury:" COOLEY, J., *Brown v. Marshall* (1882), 47 Mich. 576, 578.

A physician having no practical experience in analysis of poison, but acquainted with the means of detecting it, is competent as an expert: *State v. Hinkle* (1858), 6 Iowa 380. [The prisoner was convicted of murder by poison. "Two physicians were called and testified as to the tests applied in the chemical analysis made of the stomach of the deceased, and also of the tests usually applied for detecting the existence of poison in such cases. Both of them testified that they were practicing physicians. One of them stated that he was not a professional chemist, but understood some of the practical details of chemistry—that portion, at least, which pertained to his profession; that he had no practical experience in the analysis of poisons, until, in connection with Doctor Francis, he analyzed the contents of the stomach of the deceased; that since that time he had conducted experiments upon a small scale; and that he was previously acquainted with the means of detecting poisons, and had since had some experience in that way. The other testified that he was not a practical chemist; that he did not follow the science as a profession; that he understood the chemical tests by which the presence of strychnine can be detected; that he professed to understand the principles of chemistry, as laid down in the books on that science; that he never experi-

mented with a view to detect strychnine by chemical tests; that he had seen experiments by professors of chemistry; and that there was one test much relied on, the trial of which he had witnessed. Defendant objected to these witnesses as incompetent, and now urges that they did not show themselves possessed of the requisite professional skill. We think they were competent witnesses:” WRIGHT, C. J., *Id.* 385-6.

[“It is, of course, desirable that great caution should be exercised in conducting experiments of this character,” that is, in analyzing the contents of a stomach in case of death from supposed poisoning by strychnine, “and that the most skillful professional aid should be secured. If conducted, however, by such as have not had experience, or by those who, though not practical chemists, give their opinions from knowledge derived from the books upon that science, such opinions would be entitled to less weight than if given by a practical chemist—he who bases his conclusions upon experience as well as books. The means of knowledge are proper to be considered by the jury, and they should give, or withhold, credence in the opinion given, as they may believe the expert qualified to speak more or less intelligently and understandingly. But to say that none shall be permitted to give their opinions, except those of the highest professional skill, or those who had given their lives to chemical experiments, would, in this country at least, render it impossible, in most cases, to find the requisite skill and ability:” WRIGHT, C. J., *State v. Hinkle* (1858), 6 Iowa 380, 386.

[Where the seller of a horse was sued for breach of warranty of soundness, a medical witness for the defendant “had already stated that he had read various standard authors on the subject of diseases, and had given his own opinion, in respect to the character of the disease of which the animal died. Certainly it

was proper, at that stage of the inquiry, to ask the witness for his best medical opinion, according to the best authority:” JOHNSON, J., *Pierson v. Hoag* (1866), 17 Barb. (N. Y.) 243, 246.

Profession or Occupation, and Experience, both Necessary.

[This is the doctrine of the principal case, and is not without some support from other courts. It was strongly affirmative of the remark of TAYLOR, J., in *Boyle v. State* (1883), 57 Wis. 472, cited in the principal case, *supra*, 485. This position had been taken by the court as far back as 1849, where the court below refused to allow a medical expert called in a case of nuisance from the erection of a mill-dam, to answer the question, “Is it not a well ascertained fact in medical science that the malaria spoken of will not cross a stream?” STOW, C. J., in affirming this ruling, said: “Was it intended that the witness should testify from his ‘scientific knowledge,’ derived from medical and philosophical works, as to facts, or, rather, examples and particular experiments therein related? or was he to speak from his ‘scientific knowledge,’ derived from his personal examination of certain ditches? If from the latter, the question was in no wise different from many others which were permitted to be answered. If from the former, the testimony would have been mere hearsay:” *Luning v. The State* (1849), 2 Pin. (Wis.) 284, 288.

The case of *Emerson v. Lowell Gas Light Co.* (1863), 6 Allen (Mass.) 146, holds that the mere fact that the witness “was a physician, would not prove that he had any knowledge of gas, without the further proof as to his experience; for it is notorious that many persons practice medicine who are without learning; and a physician may have much professional learning without being acquainted with the properties of

gas, or its effects on health:" CHAPMAN, J., p. 148.

[Wharton notices this decision, as contrary to his own statement that an expert "need not be exhaustively acquainted with the *differentia* of the specific specialty under consideration," and adds, "If this were necessary, few experts could be admitted to testify; certainly no courts could be found capable of determining whether such experts were competent. A general knowledge of the department to which the specialty belongs would seem to be enough. Thus, a physician, not an oculist, has been permitted to testify as to injuries of the eye" (*Castner v. Sliker* (1868), 33 N. J. L. 95, 507; *State v. Sheets* (1883), 89 N. C. 543), and other examples: 1 Whart. Ev. § 439.

[The second of Wharton's citations is apt to the present annotation. "Dr. Lewis stated that he had attended lectures at a medical college and had practiced his profession for seven years; that, although he had never been called to a case of poisoning, he had experimented some with poison on dogs and other animals, and he thought he was qualified to give an opinion as to the effects of poison. Dr. Bulla testified that he had been a practicing physician since 1845, and he had had some experience of the effect of poison on the human species, but very little in regard to brute animals, and he thought he was competent, to a certain extent, to give an opinion. There was no error in the ruling of his Honor, that both of these physicians were competent to testify as experts. When the professors of science, as physicians, for instance, swear that they are able to pronounce an opinion in any particular case, although they say, at the same time, that precisely such a case had not before fallen under their observation, or under their notice in the course of their reading, it

is competent to give in evidence, their opinion: *State v. Clark* (1851), 12 Ired. (N. C.) 151. To the same effect is *Horton v. Green* (1870), 64 N. C. 64, which was an action to recover damages for deceit in the sale of a mule alleged to have glanders. One Dr. Rivers was examined, who had been practicing his profession for eleven years. When asked whether, from his general knowledge of disease, he could tell whether the symptoms, in that case, indicated that the disease was of long standing or not, he answered that he had no particular acquaintance with the diseases of stock, but from his books, observation and general knowledge of diseases of the human family, he could tell whether certain symptoms indicated that a disease of recent or long standing, though he had never seen a case of glanders, unless that was one. It was objected that the witness had not qualified himself to answer as an expert, but this Court held that he was competent:" ASHE, J., *State v. Sheets* (1883), 89 N. C. 543, 549.

Post Mortem Examination.

In *State v. Cole* (1883), 63 Iowa 695, [the defendant was convicted of poisoning his wife, while in childbirth. Upon appeal, the defendant assigned "as error, that the Court erred in allowing certain physicians to testify, as experts, to having made a *post mortem* examination, and to having found indications of arsenic in the stomach of the deceased. * * * The physicians who testified, were shown merely to be physicians of considerable length of standing in practice. Whether such persons should have been held to be qualified to testify as experts, in respect to the *post mortem* examination, and indications of arsenic, is a question upon which we are not entirely agreed. The *post mortem* examination of a human stomach, for the detection of indications

of poison, does not necessarily come within the experience of a medical practitioner. But toxicology is treated as a branch of medical jurisprudence, and it may be regarded as belonging to medical science. On a question, then, as to whether a person is qualified to make a *post mortem* examination of a human stomach, and testify to indications of arsenic, it would be proper to allow evidence that he is a medical practitioner. We do not say that the Court, upon such fact alone being shown, should necessarily allow him to testify. We merely say that, if he is admitted upon such fact, the Court does not act wholly without evidence. This matter of passing upon expert qualifications is not one that is subject to very well defined rules. * * * It may be conceded that when a witness is offered as an expert, the Court would not be justified in allowing him to testify against the objection of the party, against whom he was offered, until some evidence was introduced that the witness was possessed of the requisite character. Where, however, as in this case, the witness has once been admitted by the Court to testify, the weight that should be given to his testimony becomes a question for the jury, and in a proper case they would be justified, doubtless, in disregarding his testimony entirely." ADAMS, J., Id. 698, 699, 702.

[Upon an indictment for murder, charged to have been caused by an effort to produce an abortion, "a witness testified that he was an experienced medical man, and that he made a *post mortem* examination of the body. He was then asked by the counsel for the State whether he believed the deceased had been with child, and, if so, what were his reasons for such belief. This question was objected to. But it was allowed, on the ground that the witness was an expert; and he stated his belief that she had been pregnant, and de-

scribed the appearances of the body, which led to that belief. He was also, against the objection of defendant's counsel, allowed to offer his opinion as to the cause of her death." *State v. Smith* (1851), 32 Me. 369, 370.

[See, also, *supra*, *Profession, or Occupation, without Experience.*

Symptoms of Poison.

In *State v. Terrell* (1859), 12 Rich. Law (S. C.) 321 [the defendant was convicted of murder by poisoning and appealed for a new trial, on the ground that medical witnesses, who admitted that they had not themselves seen the human system under the known operation of strychnine, were permitted to testify from information confessedly derived from their books what effects were produced by it on the system, and, consequently, what were the symptoms of poisoning by strychnine. "The character and effects of strychnine were properly inquired into from the physicians. It is but recently known as a *poison*, and the most experienced physicians have had little opportunity of judging of its effects on the human system from cases within their practice. Five medical men were examined, only two had had the opportunity of testing its effects. But they are concurred in pronouncing that the cases under their treatment and observation, at this time, were affected by strychnia. Their judgments were formed from their previous course of habit and study. * * * But a medical man, having acquired his knowledge from books, lectures and oral instruction, is prepared to decide upon the character of the poison, and its effects, and his title to credit, both scientifically and otherwise, can be judged of, from his examination, by the jury." O'NEALL, J., Id. 328.

[Upon a trial for murder by the same poison, *EAKIN, J., Polk v. State* (1880), 36 Ark. 117, 123, 124, said—"It should

have been first shown that Dr. Curtis was qualified to speak as an expert, from study and experience in medicine. It would not have been objectionable, then, to have asked him to describe, generally, the symptoms of strychnine, in the human system, because these are facts of science, depending upon the course of nature, although coming seldom under the observation of others than experts in medicine. And if it had stopped there, it would have been competent for the jury to have compared the symptoms testified to by the witnesses with those given by the expert, as to the usual effects of strychnine, as affording some tendency to prove the manner of the death."

[See, also, *supra*, under *Profession or Occupation and Experience, both necessary*.

Effect of Drugs.

A physician, testifying as an expert, to the effect of oil of savin, in producing an abortion, may give an opinion founded upon his reading and study alone: *State v. Wood* (1873), 53 N. H. 484. ["It is settled, in *Taylor v. Railway* (1869), 48 N. H. 304. * * * This case, we think, fully sanctions the direct examination of this witness, upon a subject where his knowledge was derived from books alone; and the cross-examination was simply the testing of the correctness of his opinion by the same standard upon which the opinion was founded,—the authority of the medical books which he had read. * * * He had stated, as well he might, on direct examination, his knowledge of a particular subject, not from any experience or actual observation, but from what he had derived merely from reading and studying medical authorities. Then he was cross-examined as to that general reading, not by putting in the books, but by inquiries whether, in his general reading, he had not found partic-

ular theories laid down, conflicting with the theory he had advanced as the result of his reading. *Collier v. Simpson* (1831), 5 Car. & Payne 73, goes further than the present case. There TINDAL, C. J., in speaking of a medical expert, says: 'I think you may ask the witness whether, in the course of his reading, he has found this laid down.' And that was upon direct examination." *SARGENT, C. J., Id.* 494, 495.

Mental Condition.

[Where, on an issue of *devisavit vel non*, and allegations of undue influence and want of a sound and disposing mind, both of the attending physicians in the last illness "were rightly permitted to testify to their opinion of" the testator's "mental capacity, immediately before and after the execution of his will, accompanied by the symptoms and appearances upon which that opinion was formed," though neither physician had any special skill in mental diseases and had never attended the testator previous to his last illness of only four days' duration: *Hastings v. Rider* (1868), 99 Mass. 622, 623, 624, 627. This case was really affirmative of *Baxter v. Abbott* (1856), 7 Gray (Mass.) 71. To the same effect, though the physician was not in attendance, but acquainted: *Bitner v. Bitner* (1870), 65 Pa. 347. *Contra, Russell v. State* (1876), 53 Miss. 367.

["The State introduced Doctor Brock," in a trial for murder, "who testified that he was a physician and surgeon of fourteen years' practice and experience, had studied psychological medicine some, and had had experience in the incipency of mental diseases. The witness then testified as to certain methods of investigating the sanity or insanity of a person, and was then asked this question: "Would not the manner in which the act was done, the circumstances of the case, the absence or pres-

ence of apparent motive, and the whole details of the transaction, be considered by scientific men in determining the question of sanity or insanity?" This question was objected to, because the witness had not shown that he had made disease of the mind a special study. The objection was overruled, and, we think, correctly. He had brought himself within the rule admitting his testimony as an expert. See *1 Greenleaf Ev.*, § 440. The extent of the witness's knowledge of a particular branch of medical science, only goes to the credibility of his testimony: *KINGMAN, C. J., State v. Reddick* (1871), 7 Kan. 143, 150. To the same effect, *Davis v. The State* (1871), 35 Ind. 496.

Specialist not Required.

[Where a life insurance company defended against the payment of a policy on the ground of suicide, practicing physicians and surgeons were admitted as experts, without showing that they had made insanity a specialty: *Hathaway's Admr. v. Nat'l L. Ins. Co.* (1875), 48 Vt. 335. Similarly, *Barnes v. Ingalls* (1863), 39 Ala. 193, in the case of a photographer called to testify to the value of the services of a photograph painter.

[See also, *supra*, *Mental Condition*.

Amount of Experience.

In *Gilmore v. Brost*, decided September 5, 1888, the Supreme Court of Minnesota held competent a practicing physician and surgeon, in a case for damages for the value of a mare, alleged to have been killed by negligent handling of a stallion. The witness "had had more or less veterinary experience while practicing medicine; and, to use his own words, was familiar, 'to a moderate extent,' with the anatomy of the horse."

["The testimony of Doctors Cotting Cheever and Foye was properly ad-

mitted. All of these witnesses were present at the autopsy of the murdered child and examined her head, and no question was made as to their competency as medical experts. The only part of the testimony objected to at the trial was that to the effect that, in their opinion, the injuries to the head could not have been produced at the same time and by one blow. This subject was within the range of the experience of medical experts accustomed to observe the effect of blows upon the human head, and was one upon which their judgment would aid the jury." *MORTON, J., Comm. v. Piper* (1876), 120 Mass. 185, 189.

Sources of Information.: See under *a skillful or experienced person*, and *skillful or scientific men*, *supra*.

Weight of Opinion.

[In *Grigsby v. Clear Lake Water Co.* (1870), 40 Cal. 396, 405, *TEMPLE, J.*, in delivering the opinion of the Court, said—"Ordinarily, it is true, witnesses testify only as to facts, leaving it to the jury to draw their conclusions, but upon matters of science and questions requiring peculiar skill, an exception is made. These witnesses ought, perhaps, to be selected by the Court, and should be impartial, as well as learned and skillful. A contrary practice, however, is now probably too well established to allow the more salutary rule to be enforced, but it must be painfully evident to every practitioner that these witnesses are generally but adroit advocates of the theory upon which the party calling them relies, rather than impartial experts, upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor of the party by whom they are employed. And, as a matter of course, no expert is called until the party calling him is assured that his opinion will be favorable. Such

evidence should be received with great caution by the jury, and never allowed, except upon subjects which require unusual scientific attainments or peculiar skill."

On a trial for murder by poisoning by arsenic "the physician whose opinion was excepted to at the trial, was competent from his long experience in the practice of his profession" (for forty years), "and with the knowledge and information he was shown to have of the symptoms of the malady of the deceased, to testify as an expert. It was for the jury to decide whether his testimony should influence their verdict, for, or against, the defendant:" MANNING, J., *Mitchell v. The State* (1877), 58 Ala. 417, 418.

["Where, on cross-examination, the" medical "witness said that if he had not been informed that there was arsenic in the house, he would not have concluded that the sickness and death were caused from poison by arsenic, but, learning this fact, he came to the conclusion he did, from observation of the symptoms of the case, and from having heard that Sam Hooks had arsenic in the house; certainly this acknowledgment greatly impaired the

force of his testimony as evidence against the prisoner, but it was not inadmissible. There was no error in the refusal to rule it out:" MANNING, J., *Mitchell v. The State* (1877), 58 Ala. 417, 419-20.

[On a trial for manslaughter, opposing medical witnesses were interrogated as to the reputation of the physician who attended the wounded man, though the capacity of such physician was not otherwise impeached. This was error, PETERS, J., saying—"A physician is an expert, and as such he may be asked questions which develop his capacity to form a correct judgment upon the experiences of his profession; but his reputation has nothing to do with this; and it can only be sustained when it is impeached:" *DePhue v. State* (1870), 44 Ala. 32, 39.

The better rule would seem to be that actual experience is not necessary to render a physician competent as an expert on a particular question, but that lack of it may and should be considered by the jury, in connection with his other qualifications, in determining the weight to be given to his testimony.

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